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No. 83-789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GENEVIEVE S. ADAMS, *et al.*,
Petitioners,

v.

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent.

DESIGNATION OF CORPORATE RELATIONSHIPS

The Procter & Gamble Manufacturing Company, filing this Brief in Opposition to Petition for Certiorari as Respondent in this proceeding, states that:

A. This is its original Designation of Corporate Relationships.

B. The Procter & Gamble Company is the parent of The Procter & Gamble Manufacturing Company.

C. The Procter & Gamble Manufacturing Company does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

D. The only affiliates of The Procter & Gamble Manufacturing Company are wholly-owned subsidiaries of its parent, The Procter & Gamble Company.

DATED: January 10, 1984

QUESTION PRESENTED

A three-judge panel of the Fourth Circuit originally decided this case by a two-to-one vote, reversing the district court's judgment in favor of Respondent. On petition for rehearing and suggestion for rehearing *en banc*, nine of the ten active judges then on the court voted by five-to-four to rehear the case *en banc*, with one active judge disqualifying himself. Upon rehearing *en banc*, the court, on January 17, 1983, by vote of seven-to-three, reversed the three judge panel, with six active judges and one senior judge voting in the majority. Three judges dissented.

On January 28, 1983, petitioners sought rehearing on the basis that the concurring opinion of Judge Widener disclosed that an absolute majority of the ten active judges on the court did not vote in favor of the *en banc* rehearing.

On August 12, 1983, the circuit court denied Petitioners' request for rehearing on the basis of the court's decision in *Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899 (CA 4, 1983), *cert. denied*, —— U.S.L.W. —— (U.S. Jan. 9, 1984) (No. 83-553) [*Eastern Airlines*], in which six of the eight active judges participating * in the decision affirmed the Fourth Circuit practice of excluding non-voting disqualified judges from being counted as "no" votes in determining whether a majority had voted for *en banc* consideration.

This Court denied *certiorari* in *Eastern Airlines* on January 9, 1984.

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* There was one vacancy on the ten judge Fourth Circuit at that time, and one judge disqualified himself.

The present case raises the same issue, and was decided in the same circuit on the authority of the *Eastern Airlines* decision, which this Court has now refused to review. Since the cases are indistinguishable, there is no reason to treat them differently.

The question presented is:

WHETHER ON PETITION FOR CERTIORARI IT IS APPROPRIATE FOR THE COURT TO REVIEW THE INTERNAL VOTING PROCEDURES FOLLOWED BY THE VARIOUS COURTS OF APPEALS IN DECIDING WHETHER TO HEAR A CASE *EN BANC*.

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OPINIONS BELOW

The opinions below are set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS AND RULES INVOLVED

Because the Petition includes only certain subsections of 28 U.S.C. § 46 and Fed. R. App. P. 35, Respondent quotes below the entire relevant Section and Rule.

§ 46. Assignment of Judges; Panels; Hearings; Quorum

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior

circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

Rule 35. Determination of Causes by the Court in Banc

(a) *When Hearing or Rehearing In Banc Will Be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) *Suggestion of a Party for Hearing or Rehearing In Banc.* A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) *Time for Suggestion of a Party for Hearing or Rehearing In Banc; Suggestion Does Not Stay*

Mandate. If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

STATEMENT OF THE CASE

Petitioners are individual employees of Respondent, The Procter & Gamble Manufacturing Company, who instituted this proceeding in the United States District Court for the District of Maryland alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

On January 7, 1981, the district court dismissed Petitioners' action on the ground that their claims had been resolved by entry of a consent decree in a prior suit brought against Respondent on their behalf by the Equal Employment Opportunity Commission (56a-73a).

On May 18, 1982, a panel of the United States Court of Appeals for the Fourth Circuit, by a two-to-one vote, vacated the district court's order of dismissal and remanded the case for further proceedings (22a-55a). Respondent filed a petition for rehearing with a suggestion for rehearing *en banc*. The petition was granted on August 30, 1982.

On January 7, 1983, the Fourth Circuit, sitting *en banc*, set aside the panel decision and affirmed the district court's order of dismissal in a *per curiam* decision (2a-21a). The *en banc* court consisted of

ten judges, including one senior circuit judge who was eligible to sit under 28 U.S.C. § 46(c) because he was a member of the original panel. Seven judges, six of whom were active judges, agreed with the *per curiam* opinion on the merits, with Judge Widener writing a concurring opinion in which he disclosed the vote granting the petition for rehearing *en banc*. Judge Phillips, joined by Chief Judge Winter and Judge Sprouse, dissented on the merits.

SUMMARY OF ARGUMENT

Petitioners claim that this case involves an important issue of substantive public federal law which has not heretofore been decided by this Court, and is in conflict with a prior decision of this Court.

But, this is not that type of case. There is no important federal issue which has not already been resolved by the Court in prior decisions; there is no conflict with any prior decision of this Court; and there is no cognizable conflict among the circuits where *en banc* procedures are the issue. On the contrary, as we shall show, the decision in this case on *en banc* rehearing is supported by prior decisions of this Court. Over and above this consideration, the sole basis for review by this Court in a case of this kind—involving an attack on the procedures of a circuit court in determining whether to grant rehearing *en banc*—falls exclusively within the Court's supervisory powers to review a decision where the court below "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for the exercise of the Court's power of supervision." Sup. Ct. R. 17.1(a). This is not such a case. Indeed, this is a case in which Petitioners seek to exercise a right to which they are not entitled as litigants.

ARGUMENT

1. The Fourth Circuit's Practice for Determining Whether To Rehear a Case *En Banc* is Sanctioned by This Court's Decisions and Petitioners, as Litigants, Have No Right to Raise by Petition for Certiorari the Validity of Those Internal Voting Practices.

The narrow issue which Petitioners seek to have this Court review is whether a particular court of appeals, here the Fourth Circuit, lacked authority under 28 U.S.C. § 46 to grant rehearing *en banc* in this case. Petitioners claim that the court could not grant such a rehearing where it consisted of ten active judges, and voted five-to-four for an *en banc* rehearing, with one judge disqualifying himself. Petitioners' claim is that an *en banc* court cannot be lawfully constituted without the affirmative votes of an *absolute* majority of active judges on the court.

Petitioners' contention lacks any semblance of merit.

This Court has had occasion to thoroughly explore and explain the meaning and application of the statute governing *en banc* hearings, 28 U.S.C. § 46. The seminal decision is *Western Pacific Railroad Corp. v. Western Pacific Railroad Company*, 345 U.S. 247 (1953). The issue presented in *Western Pacific* arose out of the denial by the Ninth Circuit of a rehearing *en banc*. The district court had denied the relief sought by the petitioners in that case and the Ninth Circuit affirmed by a two-to-one vote. The petitioners then applied for rehearing with a suggestion for rehearing *en banc*. The three judge division of the court which had originally heard the appeal denied the petition for rehearing *en banc*. The *per curiam* order stated that:

> Insofar as the petitions seek a rehearing *en banc*, they are stricken as being without authority in law or the rules of practice of the Court (*Western Pacific*, 345 U.S. at 263).

Following this action by the division, the petitioners in that case renewed their demand for an *en banc* hearing by asking the full court to reinstate the petitions. The chief judge convened the full court, which declined to reinstate the petitions and explained that § 46(c) commits to a decision of three judges the power to hear and determine controversies assigned to it. The Ninth Circuit went on to say that the decision of the division was final and that the other circuit judges on the court were not entitled to participate or play any part in the deliberation of the panel at any stage.

This Court first considered and rejected the petitioners' claim that they had the right to compel all nonsitting active judges to vote on their request for an *en banc* hearing. In so holding, this Court stated:

> Consistent with the statute, the court may, as has been shown, adopt a practice whereby the majority of the full bench may determine whether there will be hearings or rehearings *en banc* or they may delegate the responsibility for the initiation of the *en banc* power to the divisions of the court. But, in recognizing the full scope of § 46(c), the full membership will be mindful that the statute commits the *en banc* power to the majority of active judges so that a majority always retains the power to revise the procedure . . . (345 U.S. at 261).

Thus, this Court made it plain that, while the majority of the active judges have the power to control the procedures for granting rehearings *en banc*, the

majority may lawfully delegate that authority to as few as three judges. At the same time, this Court did not define a "majority" as being an absolute majority or hold or even intimate that a judge disqualifying himself in a particular case should be allowed to vote on an *en banc* request or sit on an *en banc* court, or that by disqualifying himself, a single judge can defeat the will of the participating active members.[1]

Because there was serious doubt as to whether the Ninth Circuit as a whole or the division ever gave any consideration to the request for an *en banc* hearing, this Court in *Western Pacific* remanded the case to the circuit for reconsideration.

In so doing, however, this Court went to great lengths to carefully delineate the scope of the circuit courts' authority to establish their own methods for ruling on petitions for hearing or rehearing *en banc*.

This Court said in describing petitioners' claim in *Western Pacific*:

> It is petitioners' claim that the Code vests in a defeated party the right to ask for a rehearing *en banc;* the court as a whole must act on such a petition; thus the Court of Appeals erred in refusing to entertain the application in this case.
>
> Obviously, the claim calls for close analysis of § 46(c). What particular right, if any, does it give to a litigant in a Court of Appeals? To what extent is he entitled to put the merits of his

---

[1] Subsection (d) of § 46 provides that:

> A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

cause before each member of the court in pressing his demand for a hearing or rehearing before the entire court? (345 U.S. at 250).

The Court then answered these questions:

> *In our view, § 46(c) is not addressed to litigants.* It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing. (345 U.S. at 250, emphasis added).
>
> * * * *
>
> Accordingly, we hold that § 46(c) does not require a Court of Appeals to do what petitioners claim should have been done in this case. *The statute deals, not with rights, but with power. The manner in which that power is to be administered is left to the court itself.* A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing *en banc* to the three judges who are selected to hear the case. On the other hand, there is nothing in § 46(c) which requires the full bench to adhere to a rule which delegates that responsibility to the division. Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised. (345 U.S. at 259, emphasis added).

The basic principles governing *en banc* proceedings, explained at length in *Western Pacific*, were reaffirmed in *Shenker v. Baltimore & Ohio Railroad*

Co., 374 U.S. 1 (1963). The petitioner in *Shenker* had filed for rehearing *en banc* in the Third Circuit. There were eight active judges on the court. The vote was four-to-two to grant the *en banc* hearing, with two abstentions. Since the Third Circuit's practice required an absolute majority of the active members of the court to grant a petition for rehearing *en banc*, the petition was denied.

This Court affirmed on the authority of *Western Pacific*. In affirming the Third Circuit, this Court did not hold that § 46(c) *requires* an absolute majority. Rather, the Court held that the Third Circuit's procedure was "clearly within the scope of the court's discretion as we spoke of it in *Western Pacific*. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals." 374 U.S. at 5.

The Court in *Shenker*, also cited with approval the following key passage *Western Pacific*, stating:

> In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order rehearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing. (374 U.S. at 4-5).

In sum, this Court has established the principles governing the courts of appeals' authority in voting on petitions for hearing or rehearing *en banc*. The statute deals not with "rights" but with "powers," and the manner in which those powers are to be ad-

ministered is for the circuit courts themselves to decide. They have "wide latitude" in deciding how that power is to be exercised and can even delegate that power to a three judge division, because, as this Court said in *Western Pacific*, "each Court of Appeals is . . . to decide for itself just how the power shall be exercised." (345 U.S. at 259). The statute creates no rights for litigants. It is addressed solely to the courts of appeals.

We submit that it is plain beyond question that the Fourth Circuit acted well within the scope of its broad powers in establishing its *en banc* procedures. The Fourth Circuit's rule, as explained and reaffirmed in *Eastern Airlines*, provides that all the active judges make the determination whether to hear a case *en banc*, giving all active judges an opportunity to vote. The majority of those *voting* prevails. Recused or disqualified judges do not vote or sit on an *en banc* court. Petitioners' only complaint is that the Fourth Circuit excludes a judge who recuses or disqualifies himself in determining a majority. The recused or disqualified judge is not counted for or against granting an *en banc* petition. Thus the vote in this case was five active judges to four for granting the rehearing *en banc*, with one judge disqualifying himself. How can anyone claim that this action was not within the powers of the court, particularly when *Western Pacific* ruled that a majority of a circuit court could delegate the *en banc* power to a three judge division, which could grant an *en banc* hearing by a two-to-one vote?

After the *en banc* decision on the merits was issued in this case, Petitioners filed for rehearing, attacking the validity of the vote granting the *en banc* hearing. The Fourth Circuit withheld ruling on the petition

until it had heard and decided *Eastern Airlines*, in which it reviewed and reaffirmed its *en banc* procedures. Significantly, eight of the then nine active judges on the court sat on the *Eastern Airlines* case, and their vote was six-to-two to reaffirm the Courts' procedures for ordering *en banc* rehearings. In *Eastern Airlines*, precisely as here, the original vote for granting rehearing *en banc* had been five active judges for and four against, with one active judge disqualified and hence not voting.

When the present case was heard on the merits in the *en banc* rehearing, there were ten active judges on the court and nine active judges and one senior judge [2] heard the *en banc* case. The vote on the merits was seven-to-three for reversal. The seven voting to reverse included six active judges, a majority of the ten active judges of the court.

Thus, any contention that an absolute majority is necessary lawfully to constitute an *en banc* court appears to be moot since, in both *Eastern* and the present case, an *absolute majority* of the active judges did in fact vote on the merits in the *en banc* proceedings and, in *Eastern*, by an absolute majority the full court reaffirmed the Fourth Circuit's practice.

After the *Eastern* decision, the petition for rehearing in this case, which had been held in abeyance, was denied by order of the Fourth Circuit on the authority of *Eastern*.

Under these circumstances, the Fourth Circuit—having made public and reaffirmed by an absolute majority of the judges in regular active service its

[2] The senior judge was eligible to sit because he was on the original three-judge panel.

practice for voting on *en banc* hearings—has fully complied with the requirements of the statute as interpreted by this Court. Accordingly, Petitioners as litigants have absolutely no grounds for obtaining review by this Court.

2. Different Internal Procedures Among the Circuits Do Not Constitute Conflicts Within the Purview of Rule 17.1(a).

Petitioners would have this Court rule in effect that 28 U.S.C. § 46 mandates one uniform rule—that a petition for rehearing *en banc* must receive the votes of an absolute majority of the active judges on the court. Such a rule is not warranted given that the different internal procedures among the circuits represent permissible differences on matters of internal governance which do not constitute "conflicts" within the purview of Rule 17.1(a).

It is far too late in the day for Petitioners' argument. The controlling decisions of this Court in *Western Pacific* and *Shenker* have already established a different interpretation of the statute. Those decisions hold that each court of appeals has wide latitude to devise its own rules for voting on whether to hear or rehear a case *en banc*.

The rules of the circuits governing *en banc* hearings are different but not in conflict. They all clearly fall within the permissible limits of their discretion under the statute and the decisions of this Court. That is certainly true of the rule followed in the Fourth Circuit.

It is to be expected that different procedures would likely be adopted by the several courts of appeals. These different procedures no doubt result in part

from different conditions prevailing in the various circuits. As an example, courts with a large number of judges might well find it appropriate to delegate their power with respect to hearings *en banc* to a division of the court, whereas circuits with fewer active judges might well be more inclined to act as a whole on petitions for rehearing *en banc*. The thirteen courts of appeals now range in active membership from four to twenty-three members, with most of the courts falling in a range of nine to fourteen active judges. The Ninth Circuit, which has twenty-three active judges, has the largest number of judges among all the circuits. The Ninth Circuit's published Rule 25 provides that:

> The *en banc* court, for each case or related group of cases consists of the chief judge of the circuit or the next senior active judge in the absence of the chief judge and ten additional judges to be drawn by lot from the active judges of the court.

Petitioners assert that five circuits—the Second, Third, Sixth, Seventh and District of Columbia Circuits—require an absolute majority, and that three circuits—the Fourth, Eighth and Ninth—apply the rule that a petition for rehearing *en banc* may be acted upon by a majority of active judges who are not disqualified.

Our research has revealed that Petitioners are in error in their count of the circuits. Most of the courts do not have a published rule. However, all have uniform practices they follow, and we are advised by the clerks' offices of the Fifth, Tenth and Eleventh Circuits that their practice is not to count a disqualified judge in determining a majority.

In addition, Petitioners' inclusion of the Seventh Circuit in their count of the courts requiring an ab-

solute majority is incorrect. The Seventh Circuit has adopted the Fourth Circuit practice, under which the court declines to count recused or disqualified judges in determining whether a majority has voted to rehear. The Seventh Circuit *Statement of Operating Procedures*, § 5(d)(1), states: "A simple majority of the *voting* active judges is required to grant a rehearing in banc." (emphasis added)[3]

Thus, so far as we can ascertain, at least seven of the thirteen circuits follow the rule of the Fourth Circuit that an absolute majority is *not* required to grant an *en banc* hearing. We do not contend that these numbers are significant in themselves. We do, however, submit that such variations in *en banc* rules of the circuits exist, and that these differences reflect the differing circumstances which prevail in the various courts of appeals.

Significantly, the Sixth Circuit, for a period of time, followed a rule that a petition for rehearing *en banc* would be considered by the original three-judge division, not the full court, where an appeal had been heard and considered by a regular court of three judges. *N.L.R.B. v. Cambria Clay Products Co.*, 229 F.2d 433 (CA 6, 1955). The rule was reaffirmed by the same circuit in *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 229 F.2d 434 (CA 6, 1955), *cert. denied*, 350 U.S. 937 (1956); *National Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d

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[3] This rule supersedes the Seventh Circuit case cited in the Petition, *Izaak Walton League v. Atomic Energy Comm'n*, 515 F.2d 513 (CA 7, 1978), *rev'd on other grounds sub nom. Northern Indiana Public Service Co. v. Izaak Walton League*, 423 U.S. 123 (1979).

537 (CA 6, 1958); and *National Latex Products Co. v. Sun Rubber Co.*, 276 F.2d 167 (CA 6, 1960). This amounted to the delegation of the power to grant or deny hearings or rehearings *en banc* to a division of the court. This rule apparently no longer applies in the Sixth Circuit, having since been changed by Rule 3(b) of the Sixth Circuit's Rules. In any event, the prior rule and the present rule are equally lawful under § 46 and the decisions of this Court.

The Second Circuit rule, announced in *Zahn v. International Paper Co.*, 469 F.2d 1033 (CA 2, 1972), *aff'd on other grounds*, 414 U.S. 291 (1973), and relied on by Petitioners, has been soundly criticized by members of that very court. On this point, it may be observed that the effect of the *Zahn* requirement of an absolute majority was that the law of the Second Circuit on the merits was decided by a three-judge panel, two of whom were *not in regular active service*—in other words by *one* active judge.[4] In the present case, the requirement of an absolute majority would have meant that the decision on the merits of an issue of national importance under Title VII would have been decided by two of the ten active judges.

The conclusion to be drawn from the diversity of practice among the circuits that have adopted different procedures for voting on *en banc* petitions, and even changed their rules in some cases, is that the individual circuits have sought to devise *en banc* rules which are most suitable for the transaction of their business—a right specifically conferred on them by Section 46(c).

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[4] The *Zahn* panel consisted of Circuit Judge Timbers and Senior Circuit Judges Moore and Smith.

3. Petitioners Are Wrong in Contending That the Fourth Circuit's *En Banc* Rule Is in Conflict with This Court's Decision in *Shenker*.

Petitioners appear to argue that the Fourth Circuit's rule conflicts with the decision of this Court in *Shenker*. This argument reflects a clear misreading of *Shenker*. The contention is apparently based on the fact that, in *Shenker*, the Court upheld a decision of the Third Circuit which denied a rehearing *en banc*. The court was composed of eight active judges, four voting to rehear, two not to rehear, with two abstaining.

The action of the Third Circuit was in conformance with its own local rule requiring a vote of an *absolute* majority of the active judges to grant a rehearing *en banc*. The Supreme Court upheld the ruling of the circuit, *not* on the ground that the denial of an *en banc* hearing was *required* by the statute, but rather on the ground that the statute does not *mandate* any particular voting procedure but leaves each circuit free to devise its own administrative machinery for ruling on petitions for rehearing *en banc*. In short, since the Third Circuit had seen fit to adopt the requirement of an absolute majority, the Supreme Court declined to interfere. This Court said:

> Such a procedure is clearly within the scope of the Court's discretion as we spoke of it in *Western Pacific*. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Court of Appeals (374 U.S. at 5).

To read *Shenker* as mandating the Third Circuit rule for all of the circuits is clearly improper. The same rationale applied by the Court in refusing to

disturb the Third Circuit rule applies with equal force to those courts of appeals following a different rule.

4. The Important Federal Question in This Case Has Already Been Decided by the Court in *Western Pacific* and Reaffirmed in *Shenker*.

Petitioners claim that this case involves an important question of federal law which has not been but should be decided by this Court.

Petitioners in advancing this argument are thirty years too late.

The question which Petitioners seek to have this Court decide is whether 28 U.S.C. § 46 requires one rule and one rule only to govern the courts of appeals in voting on hearings or rehearings *en banc*. The rule Petitioners espouse is that a petition for hearing or rehearing *en banc* must have the concurrence of an absolute majority of the active judges in the circuit, and that judges who do not vote due to recusal, disqualification, lack of capacity, absence, abstention, or illness must be counted as votes against entertaining an *en banc* petition. Under Petitioners' argument, every circuit would be required to follow the same uniform rule.

This theory of the meaning of § 46 was fully considered and rejected by the Court in 1953 in *Western Pacific* which, after a thorough discussion of the language, purpose, and legislative history of the statute, reached an exactly opposite conclusion. The Court held that the statute delegated to the individual circuit courts the broad power to devise their own procedures for voting on *en banc* hearings and rehearings. Ten years later, in *Shenker*, the Court quoted from and reaffirmed the holding of *Western Pacific*.

The *en banc* procedure is indeed an important one. But, as we have clearly shown, this question has long since been definitively resolved by the Court contrary to Petitioners' contention.

CONCLUSION

Based on the foregoing, The Procter & Gamble Manufacturing Company respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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